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State Indemnity for Errors of
Criminal Justice

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STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE

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WITH AN EDITORIAL PREFACE

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TO ACCOMPANY THE BILL (S. 7675) TO GRANT RELIEF TO PERSONS ERRONEOUSLY CONVICTED IN COURTS OF THE UNITED STATES

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EDITORIAL

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WITH REFERENCE TO

A BILL To grant relief to persons erroneously convicted in courts of the United States.

The State is apt to be indifferent and heartless when its own wrongdoings and blunders are to be redressed. The reason lies partly in the difficulties of providing proper machinery and partly in the principle that individual sacrifices must often be borne for the public good. Nevertheless, one glaring instance of such heartlessness, not excusable on any grounds, is the State's failure to make compensation to those who have been erroneously condemned for crime.

There is plenty of analogy for such a measure. The Federal Court of Claims is a standing example of the general maxim that the State should fulfill its obligations and redress its wrongs by judicial inquiry and award. And a particular analogy here is found in the constitutional principle that compensation should be made for property taken for public purposes. To deprive a man of liberty, put him to heavy expense in defending himself, and to cut off his power to earn a living, perhaps also to exact a money fine—these are sacrifices which the State imposes on him for the public purpose of punishing crime. And when it is found that he incurred these sacrifices through no demerit of his own, that he was innocent, then should not the State at least compensate him, so far as money can do so?

Why has the principle never been here applied? Because we have persisted in the self-deceiving assumption that only guilty persons are convicted. We have been ashamed to put into our code of justice any law which *per se* admits that our justice may err. But let us be realists. Let us confess that of course it may and does err occasionally. And when the occasion is plainly seen, let us complete our justice by awarding compensation. This measure must appeal to all our instincts of manhood as the only honorable course, the least that we can do. To ignore such a claim is to make shameful an error which before was pardonable.

To disentangle the subject of prejudices, let us distinguish three different kinds of cases: (1) Cases where officer of justice is legally liable; (2) cases where the innocent man's sacrifice extends only up to his acquittal; (3) cases where it extends to and beyond his conviction.

(1) *Wrongs by officers* are now taken care of by the law. If the officer is insolvent there is practically no redress, and the State might therefore be asked to compensate. We leave aside this question; it is for the far future.

(2) *Wrongs done by the State preceding an acquittal* include the loss of personal liberty, the loss of income, the loss of reputation and the expense incurred by one who is later acquitted. Here it is clear that the State must arrest and try *all* duly accused persons, though it is certain that a large proportion will be found innocent. The innocent man has here made a sacrifice for the public good. There is no redress against the officers; they have faithfully kept to their duty under the law. The public good has gained quite as much as it would have done when commerce was served by a railroad placed on land taken by force from that same man. Why should not the sacrifice be compensated? In a civil case at least costs are given against the unsuccessful litigant. Why should not the State allow costs against itself? Perhaps the amount of the expense bill would look too great. This may be a practical deterrent. But let us at least admit the principle and go on to the third class of cases.

(3) *Wrongs done by the State through erroneous conviction* are so much rarer than the preceding class that the expense of doing justice need here not be deterrent, and this wrong, when it does happen, is so much more grievous that it stands by itself in its appeal to our sense of justice. Moreover, the moral effect of such an unredressed wrong is so bad that we can afford to make special effort to prevent it. A few cases of this kind stand in our annals as perpetual blood marks and do more to weaken the cause of law and order than a thousand unjust acquittals. The case of Lesurques, in France, just before the Revolution—a victim of mistaken identity—is chronicled in every book on circumstantial evidence. The case of Adolph Beck, in England only a few years ago, has done much to undermine the profound faith of the English people in their courts and their police. How much better if the law provided frankly beforehand for redress in such contingencies. Would not this at least restore our faith that justice would ultimately be done? In both those notable cases the Government made a donation by way of expiation—in Beck's case the sum of £5,000. But to leave such expiation to the whims or the sympathy of a busy political officer and to the chances of persistent intrigues, by the friends of the victim, is unworthy of an enlightened community. And in our own country it was left to the beneficence of a private citizen (Andrew Carnegie) to do something for Toth, the latest victim of justice's errors, who lay for 20 years in a Pennsylvania prison, convicted of a crime which he never committed.

Why should we not provide for such grievous errors of justice? Almost every continental nation has done something substantial during the last hundred years to correct this defect in the law. Shall we lag behind any longer?

It is nobody's interest, apparently, to move for such a law. You and I have never suffered in that way; no large business interest is threatened; no class of persons directly feel a loss in their pockets; and so nobody exerts himself. Only the casual victims feel the wrong and to expect them to unite in a demand for legislation is absurd.

Mr. Borchard's article reprinted below ought to appeal to every citizen of the land and particularly to every legislator. He sets forth what has been done on the Continent and points out the entire feasibility of the measure. We ask for its earnest consideration.

Mr. Borchard has drafted a bill, which is printed in this document at page 31 and is now pending in Congress. By this bill the Court of Claims is given jurisdiction of such cases arising under Federal jurisdiction. The bill can be easily adopted for the same purpose in State courts for State cases. We trust that the movement for this amendment of our law will spread, and that it will be taken up by the Institute of Criminal Law and Criminology.

J. H. WIGMORE.

EUROPEAN SYSTEMS OF STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE.

EDWIN M. BORCHARD, Law Librarian of Congress.

In an age when social justice is the watchword of legislative reform, it is strange that society, at least in this country, utterly disregards the plight of the innocent victim of unjust conviction or detention in criminal cases. No attempt whatever seems to have been made in the United States to indemnify these unfortunate victims of mistakes in the administration of the criminal law, although cases of shocking injustice are of not infrequent occurrence. The case of Andrew Toth, who was convicted of murder in Pennsylvania, sentenced to life imprisonment, and after having served 20 years was found to have been absolutely innocent, is still fresh in the public mind. There was no provision of law for relieving his terrible condition, the State legislature declined to make compensation, and only through the generosity of Andrew Carnegie, who pensioned him at $40 a month, was the man able to return to Hungary, his native land.[1] In England, the flagrant injustice meted out to Adolf Beck, who through the most lax administration of the criminal law was convicted for the crime of another man and was imprisoned for seven years, resulted at least in the establishment of the Court of Criminal Appeal (7 Edw. VII, c. 23) though it left the unfortunate Beck without the slightest legal redress.[2]

Up to the present moment Anglo-American public law is wholly opposed to granting an indemnity to such victims of the errors of criminal justice. The safeguarding of society by the prosecution of crimes against it is, to be sure, an attribute inherent in all governments, one of the *jura majestatis*. For mistakes in exercising this sovereign right, says our law, there can be no liability of the State. We go even further. Whether the injury to the individual is accidental or intentional on the part of the State or on the part of the *judge* (except one of most inferior jurisdiction), the injured person is left without redress.

Yet, within certain spheres of governmental action involving similarly a public interference with private rights, we admit freely that the State owes compensation to those individuals upon whom special

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[1] Virginia Law Register, v. 17, p. 406.

[2] For a full report of this remarkable case of mistaken identity see Parliamentary Papers, 1905, v. 62, Cd. 2315, Committee of Inquiry into the case of Mr. Adolf Beck. Report from the Committee, London, 1904; Sims, George. The martyrdom of Adolf Beck. London, Daily Mail Office, 1904; Lowell, Government of England, New York, 1908, v. 2, p. 463. Parliament to some extent subsequently vindicated English justice by granting Beck a gratuity of £5,000. The Epps case, reported in the Chicago Tribune of Sept. 23, 1912, and the Hartzell case in Chicago, reported in the press Oct. 25, 1912, are typical of such injustice.

damage is inflicted. When property is taken from individuals for the public use our fundamental law prescribes that just compensation must be paid. Publicists as far back as Grotius, Puffendorf and Bynkershoek recognize that compensation is a necessary incident to the exercise of the right of eminent domain.[1] On the other hand, when in the administration of the criminal law, an equally sovereign right, society takes from the individual his personal liberty, a private right at least equally as sacred as the right of property, it dismisses him from consideration regardless of the gross injustice inflicted upon an innocent man without even an apology, much less compensation for the injury. Jurists who uphold the right of the State to prosecute and convict innocent persons without making compensation have been driven to draw fine distinctions between the taking of property and the taking of liberty for the public use. We shall discuss these distinctions below.

The ultimate end and object of government is to protect those rights which, as Blackstone denominates them, are the absolute rights of all mankind—the right to personal security, to liberty and to property. The unquestioned manner with which in Anglo-American law the liberty of innocent persons is sometimes taken is all the more startling in view of the history of individual rights since *Magna Charta*.[2]

The object of this article is to show the methods by which the legislatures of Europe have solved the problem of indemnifying those innocent individuals who, in the exercise of a sovereign right beneficial to society and to the State in its function as the preserver of the public peace, have been unjustly arrested, detained, or convicted and punished. First of all it may be well briefly to review the law in this country and on the Continent in order to show the wide difference in the civil remedies granted to persons who are wrongfully or erroneously arrested or convicted.

In the United States we, of course, recognize the right of an individual wrongfully prosecuted on private information or complaint to sue the complaining witness for false imprisonment or malicious prosecution without probable cause. Likewise if his unfortunate predicament is due to the malfeasance, misfeasance, or nonfeasance of an officer exercising ministerial powers, or even of certain judicial officers of inferior jurisdiction, the law gives redress to the injured person by an action for damages against the officer.[3] Where, however, the unjust detention or conviction results from the error, or even from the malice, fraud or corruption of a judge of general jurisdiction or where it results from an unfortunate concurrence of circumstances, the individual is without a civil remedy.[4] The rule in this country may be expressed as follows:

> No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. * * * If corrupt he [the judge] may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may be done.[5]

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[1] Citations in article of Henry Wade Rogers, "Compensation as an incident of the right of eminent domain," Southern Law Review, v. 5, N. S., 1879-80, p. 5.

[2] An act of Massachusetts of June 22, 1911, authorizes compensation for lost income to acquitted persons confined in excess of six months while awaiting trial.

[3] Throop, Public Officers, New York, 1892, sec. 724.

[4] Excess of jurisdiction must be distinguished from entire absence of jurisdiction. For wrongful acts in cases where he has no jurisdiction at all the judge is civilly liable. See Mechem, Public Offices and Officers, sec. 628 and sec. 629; Bradley *v.* Fisher, 13 Wall., 335, 351; Hughes *v.* McCoy, 11 Colo., 591.

[5] Throop, Public Officers, New York, 1892, sec. 713.

As a general rule no person is liable civilly for what he may do as judge while acting within the limits of his jurisdiction, nor is he liable for neglect or refusal to act. The rule is especially true where the judge is one having general jurisdiction, and in such case there is no liability even though he exceeds his authority. The overwhelming weight of authority is to the effect that where a judge has full jurisdiction of the subject matter and of the parties, whether his jurisdiction be a general or limited one, he is not civilly liable where he acts erroneously, illegally, or irregularly. * * * Nor is he liable for a failure to exercise due and ordinary care or where he acts from malicious or corrupt motives.[1]

The reason for the rule is thus stated by Mechem:

Courts are created on public grounds. They are to do justice as between suitors, to the end that peace and order may prevail in the political society and that rights may be protected and preserved. The duty is public and the end to be accomplished is public. The individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the State in such form and before such tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible.[2]

The general rule of the immunity from civil suit of a judge having jurisdiction for injuries resulting to private individuals from his acts, however malicious or corrupt, is, therefore, well established in our law. In the absence of statute any liability of the State is, of course, absolutely excluded, and up to the present time no such statutory liability has been assumed either in England or in the United States.

In most of the European countries, on the other hand, the innocent individual unjustly arrested, prosecuted, or convicted has the civil remedies recognized by us—*first*, a right of action against the complaining witness or other person who has wrongfully accused him or otherwise aided in his prosecution,[3] and, *secondly*, a right of action against the officer through whose act he has been injured, where there has been an excess or abuse of the officer's legal powers.

But at this point the similarity ceases. The extensive immunities of a judge from private suit in this country are only recognized by the civil law within the narrowest limits. On principle the continental judge is liable for his tortious acts in excess or abuse of his authority like any other officer, the only qualification being that in matters within his judicial discretion he is allowed considerable leeway. But corrupt or malicious exercise of judicial powers in all cases involves the personal liability of the judge.[4] Besides the right of action

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[1] 23 Cyc., pp. 568–569 and authorities there cited.

[2] Mechem, Public Offices and Officers, Chicago, 1890, sec. 619, citing Cooley.

[3] See, for example, art. 373 of the French Penal Code.

[4] See, for example, Austria, art. 9 of the organic law of Dec. 21, 1867, and the law of July 12, 1872, on the judicial power and the right of action for torts by judicial officers in the exercise of their functions. Also, Spain, Ley de Enjuiciamiento Civil, 1881, art. 903, et seq. Sec. 505 of the French code of civil procedure provides that judges are liable to civil suit in the following cases: First, if there has been malice or deceit (*dol*), fraud (*fraude*), or extortion committed either in the proceedings or in the judgment; * * * Fourthly, for a denial of justice. In France, the procedural difficulties of bringing an action against a public officer are somewhat greater than in Germany, although the substantive rights against a wrongdoing officer are now practically the same in both countries. Up to the last decade, the French officer enjoyed greater immunity for his official acts than the German. The German civil code, sec. 839, par. 1, provides: "If an officer willfully or negligently commits a breach of official duty incumbent upon him as toward a third party, he shall compensate the third party for any damage arising therefrom." Paragraph 2 provides that "if an officer commits a breach of his official duty in giving judgment in an action, he is not responsible for any damage arising therefrom, unless the breach of duty is punished with a public penalty to be enforced by criminal proceedings." This last clause applies to cases of willful perversion of justice under sec. 336 of the penal code and includes malicious or corrupt exercise of the judicial power. The commentaries of Planck and Staudinger explain the narrow limitations of par. 2 just quoted. It applies first to a *final judgment only* and does not excuse gross negligence, malice, or corruption. For all intermediate and interlocutory orders and decrees—as in negligently ordering an arrest or attachment, declining to receive evidence, failure to call a witness demanded by a defendant, a disregard of undisputed testimony—the judge is civilly liable and is not protected by the immunity granted in par. 2 of sec. 839. See Nöldeke, Die civilrechtliche Haftung des Richters nach dem B. G. B., in Gruchot's Beiträge zur Erläuterung des deutschen Rechts, vol. 42, 1898, p. 795, at pp. 808, 821–822; Delius, Haftpflicht der Beamten, Berlin, Guttentag, 1899, pp. 206 et seq.

against ministerial officer or judge, however, the individual has certain remedies unknown to Anglo-American law. He has *thirdly* a right of action *against the State* for the illegal acts of its officers, including its judges. This is a subsidiary liability of the State fixed by statute which renders the State and the officer liable *in solido* for the injury to the individual.[1] It will be noted that under this head State liability apart from judicial and personal culpability is not recognized. *Fourthly*, certain constitutions, such as those of several of the Cantons of Switzerland, under the head of personal liberty, allow a direct claim against the State for illegal arrest. These cover cases of arrest in disregard of the forms of law or of its substantial provisions. While *habeas corpus*, with the possibility of action against some inferior officer, would probably be the remedy in this country, a *direct* action against the State is permitted in these Swiss Cantons. The claim here does not arise from the admitted innocence of the accused, but from the illegal infringement or interference with his personal liberty. *Fifthly*, and lastly, we have in Europe the case of an indemnity awarded by the State to those erroneously arrested, detained, and imprisoned individuals whose innocence is subsequently established.

Most of the countries of Europe, after years of struggle on the part of reformers, have now by statute recognized the liability of the State for injustice thus inflicted. The discussion of this subject will occupy the remainder of this article.

HISTORY.[2]

In Greece and Rome the procedural distinctions between civil and criminal law were not clearly marked. Crime was prosecuted by the individual who suffered from the consequences of the specific act. Nevertheless, it was even then admitted that the private complainant, *calumniator*, was liable to the defendant in damages for a wrongful accusation or prosecution. The recognition of this liability of the complaining witness continues throughout the middle ages. In the *Constitutio Criminalis Carolina* of Charles V of 1532, it is provided (article 12) that the complainant must furnish bail for the damages suffered by the accused should the complaint not be sustained. When the prosecution of crime became the function of the State alone and purely a matter of public law, the question of compensation to an unjustly accused or convicted person, where the State was the complainant, was left out of consideration.

The movement for the indemnification by the State of erroneously convicted persons was begun toward the end of the eighteenth century in France, the land of "liberty, equality, and fraternity," and of the "social contract." One of its most earnest champions was Voltaire, the friend of the oppressed. He had taken a prominent part in securing the acquittal and restoration of the rights of Calas, of the

[1] Ziegler, E. Die direkte oder subsidiäre Haftung des Staates und der Gemeinden für Versehen und Vergehen ihrer Beamten und Angestellten, in Zeitschrift für Schweizerisches Recht. n. F. v. 7 (1888), pp. 481–562. See also, Stengel, Karl, v. Die Haftung des Staates für den durch seine Organe und Beamten Dritten zugefügten Schaden, in Hirth's Annalen des deutschen Reichs, 1901, pp. 481–508, 561–592.

[2] The history of the movement, both in legislation and in literature, for the indemnification of unjustly arrested, detained, and convicted persons, may be found in Geyer, Die Entschädigung freigesprochener Angeklagten. Nord und Süd, v. 18, 1881, pp. 167–184; Pascaud, H. Erreurs judiciaires, in Nouvelle Revue, Jan. 1, 1891, v. 68, pp. 144–162, and in Revue critique de législation, 1888, pp. 597–637; Riecker, W. Die Entschädigung unschuldig Verhafteter und Bestrafter, Tübingen, 1911; Bernard, M. P. De la réparation des erreurs judiciares, Revue critique de législation, v. 37, 1870, pp. 360–415, 481–523.

Sirven family, of De La Barre, and others.[1] It was probably due to the intimate correspondence between Voltaire and Frederick the Great that we find in Prussia in 1766 the first legislative expression of the obligation of the State to indemnify unjustly arrested and detained persons.[2] This decree provided:

> If a person suspected of crime has been detained for trial, and where, for lack of proof, he has been released from custody, and in the course of time his complete innocence is established, he shall have not only complete costs restored to him, but also a sum of money as just indemnity, according to all the circumstances of the case, payable from the funds of the trial court, so that the innocent person may be compensated for the injuries he has suffered.

This equitable provision was probably short lived. At all events it is not found in the Prussian Code of Criminal Procedure of December 11, 1805.

In 1781 the Academy of Sciences and Fine Arts at Chalons-sur-Marne again agitated the question, prompted undoubtedly by the severe cases of injustice by erroneous conviction which had then lately occurred in France. The Academy awarded two prizes for the best essays on the following question:

> When the civil society, having accused one of its members, by the agency of its public authorities, fails in its accusation, what would be the most practicable and least expensive means to secure to the citizen, recognized as innocent, the indemnity which is due him by natural law?

Prizes were awarded to the authors of two monographs, which have since become classics in the literature of the subject.

The author of the first work, *Le sang innocent vengé ou Discours sur les réparations dues aux accusés innocents*, is Jean Pierre Brissot de Warville; the second, by the Intendent of Finances, Louis Philipon de la Madelaine, is entitled *Des moyens d'indemniser l'innocence injustement accusée et punie*.[3] Their thesis briefly was that while it is an injury to the public interest if we hesitate to prosecute a suspected guilty person for fear of striking an innocent person, still public prosecution being a compulsory act, it would be wrong to punish the public prosecutor who has prosecuted an accused person subsequently declared innocent by the courts. The accused citizen, however, ought to receive compensation from the State. Brissot calls attention to the indifference of society to the fate of the innocently accused person and advances the argument that the withholding of an indemnity is inconsistent with the social contract.

Since that time many of the foremost publicists of Europe have given serious study to the question and it may not be out of place in the course of this paper briefly to direct attention to their labors.

Between 1786 and 1792 the question under consideration was constantly agitated in the French Parliament and by French jurists.[4] In 1788 Louis XVI presented to the States General an ordinance accompanied by a declaration that he was surprised that nothing had been done in France to indemnify persons erroneously convicted, and that the King considered such indemnification as a debt of justice. In 1790 Pastoret in his *Théories des Lois Pénales* devoted a

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[1] Hertz, Voltaire und die französische Strafrechtspflege, Stuttgart, 1887, p. 1 ff., p. 83 ff.

[2] Neue Verordnung um die Prozesse zu kürzen, sec. 9, cited from Berolzheimer's Die Entschädigung unschuldig Verurteilter und Verhafteter, 1891, p. 7. Berolzheimer obtained a copy of the decree of Jan. 15 1766, from the Prussian Staatsarchiv.

[3] Both monographs are printed in the Bibliothèque philosophique du législateur, du politique et du jurisconsulte, Berlin, 1782, v. 4, pp. 275–329; v. 6, pp. 169–243.

[4] Pascaud, op. cit. Revue Critique, 1888, pp. 617–618. See also Berlet, De la réparation des erreurs judiciaires. Paris, 1895. Also, Bernard, op. cit.

chapter to this subject. He compared the misfortune of being innocently convicted to being struck by lightning and declared that the conviction of innocent persons was "as unavoidable a misfortune in our social order for the *moral* existence of the citizen as hail or lightning is for his *physical* existence." In the same year Duport in his draft of a code of criminal procedure, which he submitted to the French Assembly, inserted an article which provided for indemnification by the State for those declared innocent of an indicted crime, leaving its amount to be determined by the jury. The French revolution put an end to the further consideration of this reform, with many other projected reforms, and not until 100 years later (1895) did France by legislation undertake to solve the problem.

In 1783 the great Italian, Filangieri [1] suggested the establishment of an indemnity fund to compensate those unjustly arrested through false complaints. In 1786 the suggestion was incorporated into the renowned code of Leopold of Tuscany, later Leopold the Second, in which it was provided (sec. 46) that—

> A fund shall be established out of the fines collected by the courts to indemnify those who have suffered from a crime, when the criminal can not make reparation,[2] as well as those who without intention or negligence, but, through an unfortunate concurrence of circumstances, have been arrested and subsequently acquitted, provided in both cases that the judge declare an indemnity as due under the circumstances and fix the amount.

The penal code of the Two Sicilies, chapter 6, article 5, contained a similar provision.[3] Since then many Italian criminologists and jurists have supported the principle, among others, Carrara and Lucchini.[4] Lucchini, the draftsman of the proposed code of criminal procedure of Italy has incorporated in his draft a provision covering State indemnity for unjustly convicted persons, but in spite of the vigorous campaign waged in its behalf, the principle still awaits legislative recognition in Italy.[5]

In England, Jeremy Bentham was the first champion of the doctrine of State indemnification for errors of criminal justice.[6] He considered the obligation of the State so obvious that any attempt to demonstrate it could only obscure it. On May 18, 1808, Samuel Romilly,[7] an apostle of criminal law reform in England, introduced a bill in Parliament leaving it to the trial court to determine whether any and how much indemnity is due to an innocent individual acquitted after an unjust conviction. Solicitor-General Plumer opposed the bill on the ground that it created a distinction between those acquitted with and without the approval of the judge, and declared this a task equally dangerous and unconstitutional. The bill was withdrawn and no attempt has since been made in England to regulate the question, although Parliament has on several occasions granted lump sum indemnities as a matter of grace to various

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[1] Filangieri. La Scienza della Legislazione, 1783, Book III, chap. 22, Milano, 1855 ed., v. 1, pp. 610 et seq.

[2] It is interesting in this connection to examine Bentham's proposals in his Traité de Législation civile et pénale. Paris, 1802, v. II, pp. 370 et seq.

[3] Geyer. Op. cit. Nord und Süd, p. 174.

[4] Carrara. Programa del corso di diritto criminali, sec. 858, 5th ed., 1877. Lucchini, L. Il carcere preventivo, 1872, 2d ed., Venezia, 1873, Appendix, pp. 258 et seq.; also in his Elementi di procedura penale, 2d ed., Firenze, 1899, p. 403.

[5] Rocco, Art. La riparazione alle vittimi degli errori giudiziare, in Rivista penale, v. 56, 1902, pp. 249–274, 395–435.

[6] Bentham, Jeremy. Op. cit. v. II, p. 378. See also Nicolas, R. Des réparations aux victimes d'erreurs judiciaires, Revue critique de législation, 1888, N. S. 17, pp. 348–356.

[7] Memoirs of the Life of Sir Samuel Romilly. 3d ed., London, J. Murray, 1841, v. 2, pp. 84–86.

innocent individuals released after having suffered imprisonment upon erroneous conviction.[1] There is now a demand for definite legislation.

In Spain the principle, expressed in an unusually liberal form, had a brief existence of 15 months in the ill-fated penal code of 1822.[2]

While the question of indemnity was again agitated vigorously in France during the middle of the nineteenth century, finding among its supporters some of the leading jurists of the time,[3] yet the principle was first accepted in modern legislation in the cantons of Switzerland, where so many modern political reforms have received their first legislative expression.[4]

The provisions of the codes of these various cantons are by no means uniform, some recognizing the right of indemnity only for imprisonment by reason of a conviction subsequently reversed on appeal, others for arrest and detention preliminary to acquittal only (*Untersuchungshaft, détention préventive*), and still others for both. To some extent we shall discuss the provisions of these codes in connection with the laws of the other countries of Europe (infra).

Brief code provisions authorizing the award of an equitable compensation to an erroneously convicted person are found in the codes of criminal procedure of Baden, March 18, 1864 (art. 184), and of Württemberg, April 17, 1868 (art. 484), and in the penal codes of Mexico,[5] December 7, 1871 (art. 344), and of Portugal,[6] June 14, 1884 (art. 126, secs. 6 and 7).

It is only, however, within the last 25 years that the countries of Europe have shown by their legislation a determined and fully considered intention to fulfill the obligation of society toward the innocent victims of the errors of criminal justice. The Scandinavian countries—Sweden, Norway, and Denmark, in the order named—enacted, in 1886, 1887, and 1888, respectively, extensive and elaborate laws on the subject. In considerable detail they worked out the conditions under which the right to indemnity shall be exercised, its various limitations, and the procedure for giving it effect as a remedy to the injured individual.[7] Indemnity is accorded both to erroneously convicted persons and to those erroneously arrested and detained. Of the three the law of Sweden is the most conservative, the law of Denmark the most liberal—in fact, the most liberal of all the countries of Europe. In 1892, Austria (Act of Mar. 16, 1892) [8] enacted a law providing for compensation only to convicted persons

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[1] The Law Times, Feb. 3, 1912, pp. 325-326; The Law Journal, London, Oct. 19, 1912, p. 623.

[2] Spain, Penal Code of 1822, arts. 179-181, Appendix, p. 22.

[3] Merlin, Répertoire, Bruxelles, 1826. V. Denonciateur and Réparation civile. Legraverend. Traité de législation criminelle. Paris, 1830, introduction, p. XXV. Dupin, Observations sur plusieurs points importants de législation criminelle, Paris, 1821. Faustin-Hélie. Théorie du Code pénal. Paris, 1843, t. I, p. 234. Bonneville de Marsangy. De l'amélioration de la loi criminelle, Paris, Cotillon, 1864, v. 2, ch. 18.

[4] Tobler, Hans. Die Entschädigungspflicht des Staates gegenüber schuldlos Verfolgten, Angeklagten und Verurteilten, mit Berücksichtigung des schweizerischen Rechts. Zurich, 1905. The most specific provisions on this subject are found in the codes of criminal procedure of Vaud, articles 254, 267, and 539; Berne, articles 235, 243, 343, 367; Tessin, articles 52, 135; Aargau, articles 278, 364; Bale-Ville (Baselstadt), articles 63, 101, 107, repealed by the law of Dec. 9, 1889, Appendix, p. 22; Fribourg, articles 220, 230, 350, 378, 388, 380; Neuchâtel, articles 245, 249, 303, 347, 431, 508. The constitution of Geneva of 1794 had provided for the award of an indemnity based on the number of days' detention. The principle, extended, is preserved in the code of criminal procedure of Jan. 1, 1885.

[5] Mexico, Appendix, p. 23.

[6] Portugal, Appendix, p. 23.

[7] Sweden, Norway, and Denmark, Appendix, p. 24-25.

[8] Austria, Appendix, p. 26. One of the best discussions of the Austrian law, including the legislative debates and "motives," is found in Hœgel, Das Gesetz betreffend die Entschädigung für ungerechtfertigte erfolgte Verurteilung. Wien, 1901. See also Klewitz, A., in Archiv für öffentliches Recht, v. 7, pp. 311-329; Loeffler, A. Die Entschädigung unschuldig Verhafteter, Wien, 1906; Krzymuski, Ed., in Revue Penitentiaire, v. 18, 1894, pp. 806-815.

acquitted on appeal and rehearing. The draft of a new law extending the indemnity to cases of detention pending trial has been under debate since 1905. A similar restriction of the class indemnified—erroneously convicted persons only—is found in the French law of June 8, 1895.[1] Hungary,[2] the following year, in sections 576–589 of its code of criminal procedure of December 4, 1896, provided compensation under certain conditions for both erroneously convicted and erroneously arrested and detained persons.

The leading country of continental Europe, Germany, waited until almost all the other important countries had by statute dealt with the matter before itself enacting legislation on the subject. It was not until 1898, in the Act of May 20,[3] that Germany enacted a law which, under very stringent limitations, awarded an indemnity to persons erroneously convicted, who on the rehearing of their case and reversal of the judgment were declared innocent. Six years later (Act of July 14, 1904) Germany extended the principle of indemnification to those under detention pending trial (*Untersuchungshaft*). Italy and Holland are debating the question and will probably soon join their neighbors in similar legislation.

THE THEORY.

It may seem strange that this principle of compensation, involving such an obvious act of justice on the part of the State, which had, moreover, received the general recognition and support of jurists, publicists, and legislators, should have had to wait so many decades before acceptance in the actual legislation of modern states. The reason for the delay was in part the unwillingness to open already cramped treasuries to unlimited inroads and the inability of lower and upper houses of legislatures to agree upon the proper limitations of the right, while not by any means the least obstacle was the bitter disagreement between jurists as to whether the indemnity was to be considered an act of grace and equity on the part of the State or a legal duty and obligation. Before enacting legislation the European legislator demands the support of sound legal as well as economic theory. For years lawyers debated this question back and forth. The statement in Merkel's *Juristische Enzyklopädie* (1st ed., 1885, sec. 63) explains much:

> That such an indemnity would represent the real feelings of justice of the German people of the present time there can be no doubt. The reason why we at the same time hesitate to give this feeling legislative expression is partly (although by no means only) because we can not base it on a dogmatic legal ground.

Arguing from legal principle a large group of jurists, whose authority carried weight among legislatures and the people, advanced three arguments which seriously hampered the enactment of legislation on the subject.

The first argument is that the State in administering justice acts in its sovereign capacity and can not be held accountable in law for

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[1] France, Appendix, p. 27. A useful study of the law of June 8, 1895, with the legislative history of the question, is found in Berlet, A. De la réparation des erreurs judiciaires. Paris, 1896. See also Pascaud, Bernard, and Nicolas, op. cit.

[2] Hungary. Appendix, p. 27. Doleshall's article in Gerichtssaal, v. 53, 1896-97, pp. 253–285, is by all means the best article on the Hungarian statute.

[3] Germany. Appendix, p. 29, 30. There is a prolific literature in Germany. The debates of publicists are found in the Verhandlung des deutschen Juristentags (German Bar Association), 11th, 12th, 13th, 16th, and 22d sessions. The legislative history is best brought out in Berichte der XI Kommission des Reichstages vom 20 April, 1896. IV session, 1895–1897. Drucksachen, 294, and Entwurf nebst Begründung (Motives), same sessions, 9 Leg. Per., v. I, No. 73. The best commentaries on the acts are those of Burlage, Berlin, 1905; Krause, Hannover, 1906; and Kähler, Halle, 1904.

the burdens which particular individuals may have to suffer, when its sovereign right has been legally exercised. To err is not illegal. If an innocent individual is by mistake convicted, this is a burden which as a citizen of the State he must bear. This is the "act of State" theory, and a frank avowal of the "assumption of risk" doctrine. If, said these jurists, there has been an intentional wrong or illegality anywhere in the case, either on the part of the complaining witness, ministerial officer, court official, or judge, the law gives the injured individual ample redress.[1]

To this the answer has been made that, while the individual in modern public law must bear the burdens of citizenship without compensation, this applies only to the general burdens borne by all the citizens as a whole, and not to special sacrifices asked from the individual in the interests of the entire community.[2] When we ask a citizen to become a juryman or a witness,[3] when his diseased animal is killed for fear of contagion,[4] when his house is destroyed to prevent the spread of conflagration, when his property is taken by eminent domain for public use, compensation is made for the special sacrifices he makes for the general benefit of society.

An ingenious replication is made to the contention that the taking of property and the taking of liberty for public use are analogous. By the taking of property, say the proponents of the "act of State" theory, the community is enriched, for which reason compensation is paid on the civil law doctrine of unjust enrichment. In the case of unjust conviction the State receives no equivalent. The deprivation of the liberty of the individual is no gain to the State.

If the compensation in eminent domain represented the public gain, this specious argument might carry weight. But it does not. The advantage to society generally exceeds by far the monetary value of the property to the individual from whom it is taken. The price paid represents not the gain of the State but the loss of the individual. It is a special sacrifice that is asked of the individual, for which society compensates him.

Two other arguments against which the champions of the obligation of State indemnity had to contend were drawn from the civil law. The first was *Qui jure suo utitur, neminem laedit;* in other words, the State acting legally can legally injure no one. But in private law, from which this analogy is drawn, there has been a gradual change from this view of the legality of an act. The principle that he who legally uses his own incurs no legal liability has been restricted in application to the narrowest limits. Even a slight invasion of the rights of third persons (under an otherwise prima facie lawful use of one's own) has given rise to the application of the principle *Sic utere tuo ut alienum non laedas.* The transition in point of view took place definitely in England in 1862, in the case of Bamford *v.* Turnley.[5] The general rule of both public and private

[1] Anschütz, Gerhard. Der Ersatzanspruch aus Vermögensbeschädigungen durch rechtmässige Handhabung der Staatsgewalt, in Verwaltungsarchiv. v. 5 (1896-97), p. 1 ff.

[2] Mayer, Otto. Deutsches Verwaltungsrecht, Leipzig, 1896, v. 2, pp. 345 ff; Bluntschli, Allgemeines Staatsrecht, Book X, ch. 5, München, 1868 ed., p. 409 ff.

[3] These illustrations show that at least in some of its applications the principle of compensation by the State for a deprivation of liberty is not unknown.

[4] Löffler. Die Entschädigung unschuldig Verhafteter. Wien, 1906, p. 8.

[5] Bamford *v.* Turnley, Law Times Rep., v. 6, N. S., 721, at p. 723. The principle "Qui jure suo utitur, neminem laedit" may be directly traced to Justinian's Digest, 50, 17, 151—nemo damnum facit, nisi qui id fecit quod facere jus non habet. It has, however, always been narrowly limited. See Blackstone III, 217, citing Morley *v.* Pragnel, Cro. Car., 510.

law now is that a private act is considered lawful and is permitted by the State, there being admittedly no negligence or fault, only to the extent that it does not infringe the legal rights of others.[1]

The other objection drawn from the civil law was, "without fault no liability," and for many years it proved one of the most serious. This principle of "no liability without fault" has been incorporated into the civil or private law of all civilized countries, and, although American statutory and nonstatutory law reveals many cases of liability without fault, the principle has been one of the great obstacles which the workmen's compensation laws have had to overcome.[2] Modern social and economic conditions, however, have brought about an important modification in the rigidity of the doctrine, so that for large classes of cases liability is predicated on the mere causal relation between the act and the injury, whether inflicted with or without fault. The workmen's compensation acts are perhaps the clearest illustration of this change in legal principle, at least as applied to cases in which a large social group is subjected to the danger of recurring accident and a more equitable distribution of the loss is mandatory.

The State, says Löffler, has escaped this obvious duty up to the present time because our feelings of law and equity are directed more toward property than toward liberty. Theft is a more reprehensible act than intentional personal injury and false imprisonment. The taking of private property, the killing of a man's diseased animal—these were recognized as subjects for compensation long before the taking of his liberty. Löffler ascribes this largely to the fact that the owners of property are a powerful social group and have induced an early social and legislative recognition of their rights, whereas those affected by wrongful arrest or conviction are a weak social group, whose voice is almost unheard, and whose rights are only at this late day securing slight recognition because of a general altruistic feeling of social justice.

It requires no further demonstration therefore to show that society rather than the individual should bear the risk of accident in the administration of criminal justice. Legislation having this end in view is supported by the same theory as compulsory social insurance, and general average in admiralty law. Where the common interest is joined for a common end, each individual member being subject to the same danger, the loss, when it occurs, should be borne by the community and not alone by the injured individual.

THE STATUTES.

An analysis of the European statutes may be useful to show particularly the limitations which European countries have placed on the granting of the indemnity. It will be seen that they have endeavored to restrict the indemnity to those only who are clearly shown to deserve it. Therefore, first, the class that has the right to receive the indemnity is strictly defined; secondly, to exclude the undeserving, specific and general limitations on the right are estab-

[1] Löffler, op. cit., p. 10. For examples of such action, see Unger, Joseph. Handeln auf eigene Gefahr, 3d ed., Wien, 1904.

[2] Ives *v.* South Buffalo Street Railway Co. 201 New York, 271, at pp. 285, 293–294, 298. See 46 American Law Review (1912), pp. 99–100, citing article by James Parker Hall in Journal of Political Economy, October, 1911.

lished from various points of view, such as censurable conduct of the claimant; thirdly, the injury indemnified is in general confined to the pecuniary loss only; fourthly, a very brief statute of limitations is provided; and, lastly, the indemnity is in other respects restricted so that the burden on the State treasury will not be oppressive. The debates preceding the enactment of many of the statutes show clearly that the fear of inroads on the State treasury prevented the extension of the right and the removal of limitations in cases where an award was otherwise recognized as just. We shall discuss the statutes under the four heads: (*a*) Who may be indemnified; (*b*) the limitations on the right; (*c*) the extent of the indemnity; and (*d*) the procedure for making the right effective.

(A) WHO IS INDEMNIFIED.

As we have seen, Austria, France, Portugal, and Geneva (code of criminal procedure, Jan. 1, 1885) grant an indemnity for the injury suffered through unjust conviction and imprisonment where on retrial an acquittal takes place. Indemnification for both acquittal on appeal after a conviction and for detention pending trial followed by acquittal or discharge is provided for in Sweden, Norway, Denmark, Germany, Hungary, Berne, Fribourg, Neuchâtel, Basle, and Tessin. The award of an indemnity is *compulsory* in case of acquittal on appeal after a conviction—that is, a right of action is given to the individual—in Germany, Norway, Denmark, Hungary, Portugal, Mexico, Neuchâtel, and Basle. It is also compulsory in case of detention followed by a discharge from custody or acquittal on first trial in Germany, Denmark, and Norway. In Germany, however, before the action lies, the court acquitting the accused on retrial, must, simultaneously with the judgment of acquittal, issue a decree to the effect that an indemnity in the case is warranted by the facts, which decree is a condition precedent to the right of action. The relief is *discretionary* in both cases—acquittal after conviction and detention pending trial—in Sweden and Fribourg. It is discretionary in case of acquittal after conviction only in Austria and France, and discretionary in cases of discharge from custody in Hungary, Vaud, Neuchâtel, and Basle. In Norway and Vaud it is also discretionary in case of a *nolle prosequi;* in general, however, a *nolle prosequi* does not open the right to the indemnity at all, a valid judgment or order of the court being required. It is explained by the committee report on the French law that the indemnity was left discretionary with the judge for the reason that it was considered best, instead of making the relief compulsory and specifying the conditions which limited the right, to prescribe no conditions, leaving the judge to determine in each case the effect to be given to the concrete circumstances in limiting the propriety of an award.

Innocence must be shown affirmatively on the part of the claimant in France, Germany, Norway, Hungary, Sweden, Mexico, and Neuchâtel. In Germany the claimant may show in the alternative that there is no longer a well-founded suspicion against him. In Hungary and in Sweden in case of unjust detention pending trial he must show any one of three things: First, in both countries, that the act for which he is held has not been committed. Second, in Hungary, that the accused has not committed it; in Sweden, that its author was

another than the accused. Third, in Sweden, that from all the circumstances it could not have been committed by him; in Hungary, that while committed by him it was not in a legal sense a punishable act.

Hungary makes an interesting distinction between cases of unjust conviction and cases merely of unjust detention pending trial. In the first case, where the sentence has been served, damages are due ipso facto, even though there is a *non liquet* acquittal. The *not guilty* are indemnified. In the second case, where, as we have seen, the award of an indemnity is discretionary, innocence must, nevertheless, be proved. The *innocent* only are indemnified. While this is not clear from the statute itself, the committee reports leave no doubt on the subject.[1] In this respect the Hungarian law occupies an intermediate position between the two extremes. In cases of unjust conviction Hungary has followed the Danish law; in cases of unjust detention, where proof of innocence is required, the Norwegian law has been accepted as a prototype.

Bonneville de Marsangy, an ardent proponent of State indemnity, advocated that innocence be proved affirmatively by the claimant, as this was a new action and on the plaintiff should fall the burden of proof. This theory was strenuously opposed by Heinze,[2] who, in 1865, brought the subject prominently before the public in Germany, and by Zucker and Geyer, who claimed that our criminal law recognizes only one form of guilt or innocence—the State must prove a man guilty or else he is innocent. It would make an odious distinction between those acquitted with and without indemnity, between those proven innocent and those acquitted for lack of sufficient proof of guilt. As we have seen, however, a number of states have adopted the principle that innocence must be affirmatively proved by the claimant.

Other states do not require proof of innocence, but base the indemnity upon the mere fact of acquittal or discharge from custody, as, for example, Austria, Denmark, Baselstadt, and Tessin. In case of erroneous conviction Denmark requires that it be "regularly proved that the penalty was not justified." Some of the Swiss Cantons show peculiar conditions in this respect. Berne, in its penal code of 1854, permits in the alternative the establishment of innocence, acquittal because of doubtful guilt, and *nolle prosequi* for insufficiency of evidence, which is a most liberal, if not a hazardous, extension of the right. Fribourg, in its code of criminal procedure of 1873, indemnifies acquitted, nolle prossed, and not guilty "convicted persons." Vaud, strangely enough, in its code of criminal procedure of 1850, indemnifies persons nolle prossed, but not those acquitted by valid judgment. Luzerne, in section 313 of its code of criminal procedure, requires that the accused should have been prosecuted without basis (*auf ganz grundloser Weise*). By this is meant the absence of suspicious conduct, lying, attempt to run away, to conceal evidence, etc.—what the Germans call *prozessuales Verschulden*.

It is curious to note that in Schwyz and Zurich, where the legislator has not provided for indemnity, the courts have at times allowed it.[3] They have limited it to such cases as show an entire absence of guilt and denied it where the evidence indicates a well-founded suspicion. This tendency to base the indemnity on the probability of guilt finds

[1] Doleshall, op. cit., p. 271.
[2] Heinze, Rudolf. Das recht der Untersuchungshaft. Leipzig, 1865.
[3] Tobler, op. cit., p. 35.

strong opponents among those authorities and courts in whose opinion mere acquittal justifies the indemnity.

The chief objections raised against the German law are that it fails to indemnify accused innocent persons who are nolle prossed, persons whose property has been attached in criminal proceedings and those who, by giving bail, have escaped detention pending trial.

There is considerable difference in the legislation of these various countries as to the right of third persons injured by the conviction or detention of another to sue for the indemnity. In Germany, those who have a legal right to support from the unjustly accused person, have an independent action, limited, however, to the amount of the support of which they have been deprived. In Hungary these same persons have a right of action for their lost support only where the accused has declined to bring the action himself. It is, moreover, limited to cases of unjust conviction, and not merely unjust detention pending trial. In Austria, a claim for lost support can be brought only by the surviving husband or wife, children or parents, where the accused began but dropped the action or where he is deceased. In most countries, Germany being practically the only exception, death of the erroneously accused (or desertion of family, as in Sweden), is a condition precedent to the bringing of the action by third persons, either heirs or dependents. In France, Austria, and Hungary the right passes to his surviving spouse, ascendants and descendants in a direct line. In Denmark, ascendants are excluded. In Hungary, in case the erroneously accused person has already paid the death penalty, those who have the legal right to support may bring the action, provided they can show *that they are dependent* on the support of which they have been unjustly deprived.

Earnest objections have been raised against this limitation of the heritability of the claim. It is said [1] that the moral integrity of the person is the common property of his family, and that damage to property rights is the basic element of the individual rights of each. Claims of both categories, therefore, must be heritable. Legislation having in mind only a right to support disregards these considerations. In spite of Jellinek's assertion that this right to indemnity is a public subjective right, and therefore personal only,[2] most of the states of Europe have recognized the heritability of the right so far as pecuniary damage is concerned. Binding even recommends, and we believe properly so, that both the moral satisfaction and the claim to pecuniary indemnity should be transferable *ab intestato*. This point of view is followed by the Danish and the French law, but is rejected by the Swedish, Austrian, German, and Hungarian law. In France it is provided that relatives of a degree further removed than would involve a material injury to them have no right to the claim.

(B) LIMITATIONS.

A limitation almost uniformly expressed in the statutes is that the claimant shall not have intentionally or by gross negligence caused his detention. The statutes of some of the countries, such as Germany, Hungary, Norway, and Sweden, specifically mention certain

[1] Doleshall, op. cit., p. 274, et seq.
[2] Jellinek, G. Staatsrechtliche Erörterungen über die Entschädigung unschuldig Verurtheilter, Zeitschrift f. d. privat— u öffentliche Recht der Gegenwart, v. 20, 1892, pp. 455–467.

limitations in cases where the detention or conviction may be said to have been due to the act of the claimant himself—thus, for example, where there has been an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion, or an analogous attempt to suppress such testimony or opinion. The statute of Denmark recognizes the possibility of extenuating circumstances. It is there provided that where, for example, the attempt to flee or the making of false statements, etc., is considered by the judge as having been due to fear, annoyance, or excusable error, he need not refuse the indemnity. He may award an indemnity reduced in proportion to the offense.

Germany has gone furthest of all in defining the conditions and limitations under which the claim shall be excluded. In the act of 1904, the claim may be rejected if it appears that the act charged involved an infamous or immoral transaction, or was committed during a state of drunkenness which excluded the exercise of free will, or when it appears from the circumstances that the accused had prepared to commit a felony or lesser crime. These may be called conditions of exclusion bearing on the *substantial* justice of the claim. Similar restrictions are found in the Hungarian statute. But Germany has gone even further and has provided expressly that certain other delinquencies of the claimant, having no connection whatever with the act charged, shall likewise deprive him of his right to relief. Thus, article 2 of the German act of 1904 provides that the claim may also be denied where the accused at the time of his release is not in possession of his civic rights, or was under police surveillance, or where he has been punished or sentenced to the penitentiary and three years have not elapsed since the termination of the sentence. In most countries these extraneous delinquencies and their effect on the right are left to the discretion of the authorities passing on the claim, whether judge or administrative board.

As we have shown above, France expressly declined to specify any limitations on the right, leaving it to the judge to determine what acts or facts shall constitute a sufficient objection to the payment of an indemnity. A slight difference between the Hungarian and German statute may here be mentioned, in that Hungary considers the failure to note an objection or appeal against the verdict as sufficient to warrant a denial of the indemnity, whereas Germany expressly provides that such failure to note an appeal shall not be construed as negligence. The draft of the proposed law of Austria governing unjust detention provides that—

> Where the accused through inexcusable negligence has failed to object to the imposition or prolongation of the detention when he had good ground so to do, he shall be denied the award of an indemnity.

Several of the statutes exclude the remedy where the act has been committed under duress, necessity, or self-defense, but this appears to us as an unjust limitation.

A very brief statute of limitations is generally provided—from three months to six months is the usual time limit for making the claim. Denmark makes an exception in permitting the action to be brought within a year from the day on which the accused had knowledge of the circumstances on which he bases his demand. This provision is rather elastic, and we have been unable to ascertain how it has been interpreted by the courts.

(c) EXTENT OF THE INDEMNITY.

As a general rule, with but few exceptions, only the pecuniary damage is compensated. In this respect, more than in any other, the statutes have fallen short of the wishes of their advocates, because in case of an unjust detention or conviction the moral damage is by far the more serious element of injury. Even the Carolina Code of 1532 recognized that *Schmach und Schande* (suffering and shame) were proper elements of compensation.

Germany, Austria, Sweden, and Norway indemnify for the pecuniary injuries suffered. Germany considers that these include not merely physical injuries and lost profits, but also the losses to *future* income, but they do not of course extend to moral injuries. In the statutes indemnifying for erroneous conviction, it is the injury suffered from the execution of the sentence, the actual wrongful imprisonment, which is compensated. Sweden provides expressly that the indemnity is to cover the "suspension or restriction of his means of existence resulting from the deprivation of his liberty." The French, Danish, and some of the Swiss statutes are the most liberal. France provides indemnity for the damages (*dommages-interêts*) suffered. In practice, however, so the authorities say, account is taken of the moral injury resulting from an unjust conviction, which is, indeed, hard to separate from the pecuniary. The Danish statute extends the indemnity to "the wrong, injury, and pecuniary losses which he has suffered." Whereas most of the Swiss codes of criminal procedure provide for indemnity without specifying what injuries are to be indemnified, the code of criminal procedure of Neuchâtel in article 508 provides that—

> In case the new decision declares the condemned person innocent, there shall be awarded to him by the court damages proportioned to the material and moral injury he has suffered by the erroneous conviction.

The Hungarian statute requires first, a return of all money penalties; secondly, the return of the costs of proceedings and the value of confiscated property; thirdly, compensation for income lost during the imprisonment; and fourthly, money damages may generally be granted. How these are to be estimated and what they are to cover is not stated. Whether they cover the loss of position, diminution and falling off in business, and loss of credit, or whether they are simply confined to the definite actual fixed property losses can not be established. The committee reports (motives) lead to the inference that more than the property loss was intended to be covered, for the Swedish and Austrian statutes are characterized as unsatisfactory in this regard. It may be stated in addition that it is the general rule in Europe to provide in the codes of criminal procedure for a return of costs to an accused person declared to be innocent.

The French law notes an express difference between material and moral injuries in the matter of heritability. Both pecuniary and moral losses are the subject of indemnity on the part of those who are sufficiently near in relationship to the accused for the presumption to be drawn that they have suffered by the conviction of their relative. But, as we have shown, the right is not extended to relatives of a degree further removed than would involve a material injury resulting to them from the unjust conviction.

It is curious to note that the draft of the proposed Austrian law according indemnity for unjust detention denies any indemnity for a detention of less than eight days. The debates show that this is based on financial considerations. The German statute of 1904 similarly excludes from indemnity the mere arrest and detention preliminary to commitment for trial, except when followed by detention pending trial, in which latter event the preliminary detention is calculated as a part of the whole. This limitation is unjust, and is so recognized by the commission redrafting the code of criminal procedure,[1] who recommend indemnification even for a brief preliminary detention. Only where the arrest is followed by almost immediate release, where there is practically no real detention, is an indemnity, says the commission, unnecessary. A provable injury is in such cases, in the opinion of the commissioners, generally impossible. To us, this proposition seems open to debate, at least.

In general the statutes recognize the obligation to accord satisfaction for the moral injury by providing for the publication of the decree of acquittal at the domicile of the accused,[2] at the jurisdiction of the appellate court, and at various other places, which presumably will aid the accused to obviate and allay any prejudice from which he may have suffered by the publication of the fact of his detention or conviction. France goes the furthest in this direction, providing that—

> The decree or judgment on appeal whence results the innocence of a convicted person shall be posted in the city where the conviction was first pronounced; in the place where the judgment was reversed; in the community or place where the crime or misdemeanor shall have been committed; at the domicile of those who demanded the appeal; and at the last domicile of the victim of the judicial error, if he is deceased, and shall be officially published in the *Journal Officiel*, and its publication in five newspapers, at the choice of the appellant, shall be ordered besides, if he requests it.

(D) PROCEDURE.

As will be seen from the statutes quoted in the appendix, the procedure is generally very complicated; in fact so complicated that it is hard to understand how the poor acquitted individual thrown out on the world can ever find the means to prosecute his claim. The statutes vary greatly from one another, only one country, Denmark, making it a right justiciable before the ordinary courts in first instance. In general, it is regarded as an administrative proceeding, which perhaps more than anything else shows that the indemnity is considered an act of grace and not a matter of legal right. Sweden requires that the claim shall be addressed to the King and shall be examined by the Minister of Justice, who is to pass upon the justice of the claim and the amount of the indemnity. In Austria the trial court pronouncing the acquittal makes an official inquiry into the facts on which the claim for indemnity is based, and the sealed documents with an opinion of the court are then laid before the Minister of Justice, who in turn fixes the amount of the award. An appeal from his finding lies to the supreme court. In Hungary the trial court makes the investigation, places its findings before the highest court, which in turn, should it decide that the indemnity is justified, sends the papers to

[1] Protokolle der Kommission zur Reform des Strafprozesses, II, p. 284, ff.

[2] The codes of criminal procedure often provide for the publication of the judgment of acquittal in the Official Gazette (Reichsanzeiger); see, for example, the German Strafprozessordnung, sec. 411, par. 4.

the Minister of Justice. On the basis of the findings of the highest court, the Minister of Justice fixes the amount of the indemnity.

In Germany, whose statute is the latest, it is provided that the second trial court, besides its decree of acquittal, shall hand down a decree as to whether an indemnity in the case is warranted by the facts disclosed.[1] This decree can not be appealed from. If it decides in favor of the claimant, he must make a formal application for indemnification to the district attorney in the jurisdiction where the trial court sat. The district attorney as a ministerial act sends the papers to the highest administrative board of the State (Landesjustizverwaltung). This board fixes the amount of indemnity, from which an appeal through the regular legal channels is granted to the claimant. Germany, therefore, has at least made this concession to those who have always contended that the right to indemnity is a strictly legal right and should be justiciable in the law courts.

Practically all the statutes provide that the State shall have a subrogated right against those individuals, officers or judges, who by their negligence, corruption, or malicious conduct shall have caused or contributed to the detention or to its undue prolongation or to the conviction of the innocent accused person.

CONCLUSION.

Such are the salient features of the more important European statutes on indemnification by the State of those whom, in the administration of its criminal justice, it has erroneously and unjustly arrested, detained, or convicted. The principle has been clearly recognized, but, as the examination of the statutes discloses the remedy in practice is granted only within the narrowest of limits. Nevertheless, a step has been taken in the right direction and one which we in this country would do well to follow. How we shall apply the principle, whether the relief shall be compulsory or discretionary, whether court or jury shall estimate the extent of the injury, within what limits and under what conditions the indemnity shall be awarded, are matters which legislatures can work out with little difficulty. While it is true that our lax methods of administering the criminal law, the possibility of acquittal on technical grounds,[2] and the requirement of unanimity on the part of 12 jurymen bring about nine cases of unjust *acquittal* to one case of unjust *conviction*, still the mere rarity of the occurrence is no excuse for a failure to acknowledge the principle and to remedy the evil. It makes the individual hardship, when it does occur, seem all the more distressing. That there have been numerous cases of this kind besides the recent Toth case in Pennsylvania and the Beck case in England there is no doubt, notwithstanding the unauthentic returns from wardens collected by the American Prison Congress and reported in this journal (May, 1912, p. 131) to the effect that there are but few cases of unjust execution of innocent persons.[3] The whole matter of compensation for unjust convictions for felonies and lesser crimes is well worth further study, to the end that within measurable time remedial legislation may cure this defect in our social institutions.

[1] For an example of such a decree, see Krause, op. cit., p. 213.

[2] See, for example, People *v.* Flack, 125 N. Y., 324; also the Illinois case cited in Green Bag for June, 1912, p. 321.

[3] A large collection of cases of erroneous executions and sentences of life imprisonment has recently been published by Justizrat Dr. Erich Sello: Die Irrtümer der Strafjustiz und ihre Ursachen, Berlin, R. v. Decker's Verlag, 1911. Vol. I, 523 p., quarto.

APPENDIX.

CONTINENTAL STATUTES.

SPAIN.

Penal Code of 1822, chapter 12. In force for 15 months. Articles 179–181 deal with indemnity for innocent persons. (Revue Penitentiaire, v. 19, 1895, pp. 568–569).

ART. 179. Every individual who, after having been the object of a criminal proceeding, shall have been declared absolutely innocent of the crime or fault to which the proceeding is due shall be immediately and completely indemnified for all the injuries and wrong experienced by him in his person, reputation, and property, and there may not be required of him for this purpose any costs or expenses, and, if he desires, a fiscal attorney shall be charged with representing him in this demand for indemnity as if it concerned a claim advanced ex officio. However, wherever it is not impossible the indemnity shall be fixed in the same sentence which declares the accused absolutely innocent. If this proceeding is not possible, the right to indemnity shall be declared and the indemnity fixed as it is prescribed in the code of procedure.

ART. 180. If the criminal action has been instituted by virtue of a private accusation, the indemnity shall be at the charge of the accuser; and if the judge has cooperated by dolus, ignorance, or negligence in the injustice of the information, he will incur the same responsibility in solido.

ART. 181. If the proceeding has been instituted ex officio and it has as its cause the dolus or fault of the judge, the indemnity shall be integrally charged to said judge. If the judge, on the contrary has acted in conformity with the law and it results from the information that the individual accused was absolutely innocent, the indemnity shall be given by the Government either in money or under the form of an honor or recompense according to the circumstances of the person, which will be determined by the sentence, but it shall always be effective and sufficient to extend to all the injuries, wrongs, and annoyances experienced by the innocent person.

BALE-VILLE (BASELSTADT).

Law of December 9, 1889, on the indemnity accorded to those who have been unjustly incarcerated. (Annuaire de Législation Étrangère, v. 19, 1889, pp. 685–686.)

ARTICLE 1. When a person has been incarcerated by order of the authorities, if the proceeding instituted against him has not ended in the remanding of the accused to the courts, he has a right at the end of the examination to an indemnity proportioned to the wrong which has been caused him and the duration of the incarceration, provided that there has been no fault on his part.

ART. 2. The claims for indemnity based on article 1 of the present law must be brought within 15 days of the end of the proceeding which led to the incarceration, under penalty of being rejected. If the release and termination of the examination are the work of the police, the police must pronounce on the indemnity. Otherwise the claim is addressed to the authority which remands the individual.

ART. 3. Appeal is allowed against the decision of the police or other authority by making, within seven days from liberation from detention, a written complaint, with the grounds stated, to the president of the tribunal or the court of appeal.

ART. 4. The commission of the court of appeal, in article 31 of the law relating to the opening of criminal procedure of November 4, 1841, shall pass upon the complaint presented in accordance with article 3 of the present law.

ART. 5. The commission decides after having heard the authority charged with pronouncing the remanding or the police and heard sufficient testimony on the basis of the amount of the claim to indemnity.

If the commission rejects the complaint the claimant may, under the head of expenses, be compelled to pay up to 100 francs.

ART. 6. The accused persons who have been liberated by a competent judge may demand of the State an indemnity proportioned to the wrong which has been caused

them by the order of incarceration, and to the duration of the detention, provided, nevertheless, that they shall not have been incarcerated by their fault.

ART. 7. When a criminal proceeding is reheard by the terms of articles 121 and 130 of the code of criminal procedure and results in an acquittal, or when it is recognized that the accused deserved a less penalty than that inflicted upon him, he may claim an indemnity proportioned to the pecuniary damage of all kinds which has resulted to him from the detention he has suffered (detention during the examination and detention as a penalty), provided, nevertheless, by his conduct he has not deserved condemnation.

ART. 8. The claim for indemnity based on the provisions of articles 6 and 7 of the present law may, as a general rule, be awarded immediately after the publication of the decree by the same tribunal which has ordered the liberation of the individual or the diminution of the penalty. The claim must be decided after the public authorities have been heard.

By exception the tribunal may postpone the decision. The injured person may likewise demand a delay of 15 days during which he may present his demand for indemnity. After that period all claim to indemnity is barred. The tribunal decides in last resort on the demands of indemnity submitted to it.

ART. 9. The competent authorities shall fix freely, taking account of all the circumstances, the amount of the indemnity which ought to be accorded by the terms of the present law.

ART. 10. The demands instituted by the terms of this law pass to the heirs after the death of the principal claimant.

ART. 11. No demand for indemnity can be directed against the officials who in the exercise of their functions have ordered a detention pending trial or a detention as penalty. On the other hand, the State may reimburse itself from its guilty employees in case of gross negligence for the amount of the indemnity which it has had to pay in conformity with the provisions of the present law.

ART. 12. Paragraphs 63 and 101 of the code of criminal procedure of May 5, 1862, on indemnities due to convicted persons are abrogated from the day the present law enters into force.

MEXICO.

Penal Code of December 7, 1871.

ART. 344. If the accused has been acquitted by the court, not because of failure of proof, but because his complete innocence of the crime with which he was charged has been established, and if he had not by his previous conduct provoked the presumption of his guilt, this shall be expressly stated in the judgment of acquittal; and when the accused demands it, the amount of his damage and lost profits which the proceedings has caused him shall be fixed in the judgment, after the district attorney has been heard. In this case the civil responsibility is paid out of the general indemnity funds, if by section 348 the judges do not appear responsible or are without sufficient means to pay.

ART. 345. The unjustly accused has a right of action against his unlawfully complaining witness or informant.

ART. 348. The judges and other public officials, employees, or officers are civilly liable for arbitrary or wrongful arrest which they have ordered; for illegal prolongation of imprisonment; for injuries caused by ignorance or tardiness in the transaction of their business; and for all misdemeanors or crime which they commit in the exercise of their functions and whereby injury is caused to others.

PORTUGAL.

Penal Code of June 14, 1884, article 126, sections 6 and 7.

SEC. 6. The judgment of acquittal on appeal from a conviction entitles the wrongfully accused person (if he demands it) to an equitable indemnity for the injury which he has suffered through his imprisonment, if the penalty has not been a money fine. If the penalty has been a money fine already paid, it shall be refunded to him. The refunding and the indemnity are charged to the State.

SEC. 7. The judgment of acquittal shall be published in the Official Gazette on three successive days and in duly authenticated form, shall be fastened to the door of the district court where the unjustly convicted person resides, and on the door of the district court, where the conviction has taken place.

The rehabilitation of duly acquitted persons in Portugal. Decree of February 27, 1895. The law of June 14, 1884, revising the penal code enumerates the means of bringing about rehabilitation. (Revue Penitentiaire, v. 19, 1895, pp. 920–921.)

ART. 11. If the accused is declared not guilty the new judgment shall declare void the judgment of conviction without reference to the provisions of the penal law and must rehabilitate the condemned before society, permit him to again occupy his legal status before conviction, as soon as the judgment shall have secured binding force. An extract of the judgment shall be published in the Official Gazette on three consecutive days and attached to the door of the court in the jurisdiction of the domicile of the rehabilitated person and to the door of the court of the jurisdiction in which the conviction was pronounced. Mention in the judicial statistics must be suppressed.

The public minister must furnish the legal means.

ART. 12. The judgment must award to the condemned person, if he requests it, a just indemnity for the injury suffered by the execution of the penalty, if there exist in the proceedings sufficient elements to appreciate this injury. In the contrary case, the indemnity must be fixed in an ordinary proceeding according to the legislation in force. If the penalty has been a fine and already paid the judgment must order its restitution.

ART. 15. It shall be permitted to revise and rehear the proceedings and judgment of a deceased convicted person, observing the previous provisions.

ART. 16. The only persons competent to demand this revision are the parents, descendants, spouse, and brothers and sisters of the convicted person.

SWEDEN.

Law of March 12, 1886, concerning indemnity to be awarded against the State to those innocently arrested or convicted. (Lag, angaende ersättning af allmänna medel at oskyldigt häktade eller dömde; given Stockholms slott den 12 Mars 1886. Svensk Författnings-Samling. No. 8, 1886.) (Translated into French in Annuaire de Législation Etrangère v. 16, pp. 591–592.)

ARTICLE 1. When an individual shall have been arrested as guilty of a crime and the prosecution against him shall have been subsequently abandoned or the accused shall have been acquitted, there may be awarded to him, or, in his default, to his wife or abandoned children, to be borne by the State, an indemnity for the suspension or restriction of his means of existence resulting from the deprivation of his liberty, if it results from the proceedings that the crime for which he has been prosecuted has not been committed, or that its author was another than the accused, or that from all the circumstances it could not have been committed by him, and if in the two latter cases he can not be considered as an accomplice.

This indemnity shall not be awarded to him who has sought by flight or otherwise to escape the examination or to prevent the discovery of the truth by the suppression of evidence or objects, nor to him who intentionally by an untruthful statement made in court or elsewhere, or by falsely denouncing himself, or in any other way shall have been the cause of the proceedings which have been instituted or prosecuted against him.

ART. 2. When an individual condemned to forced labor or prison or to fines, converted into a penalty depriving him of liberty, shall have suffered the burden of his penalty in whole or in part and after a new inquiry or proceeding made in the regular form he shall have been acquitted or condemned to a penalty less than that which he has already paid, there may be awarded to him, or, in his default, to his wife or abandoned children, to be borne by the State, an indemnity for the suspension or restriction of his means of existence resulting from the execution of the penalty or of that part of this penalty from which he shall have been subsequently released, if he has not intentionally by an untruthful statement made in court or elsewhere, or by denouncing himself falsely, or in any other way caused the penalty he has suffered to have been pronounced against him.

ART. 3. A request for indemnity within the provisions of this law shall be addressed to the King, and shall, to be examined, be presented to the minister of justice within a period of a year beginning, in the case provided for in article 1, from the day when the decision to abandon the prosecution or acquit the accused shall have become res judicata, and, in the case of article 2, from the day when the judgment pronouncing the acquittal of the accused or his condemnation to a penalty less than that already suffered shall have acquired the force of res judicata.

ART. 4. When an indemity shall have been awarded within the terms of this law to an individual imprisoned or condemned in violation of the law, the State shall have the right of recourse against him or those who shall be responsible for the imprisonment or judgment.

NORWAY.

The law of criminal procedure of July 1, 1887 (Jury law). (Lov om rettergangsmaaden i straffesager, 1 Juli, 1887, No. 5. Secs. 469–472. Norsk Lovtidende, 1887, p. 200 at p. 285–6.)

SEC. 469. When an individual is acquitted by a judgment after having already paid a penalty under previous conviction he shall on demand be paid from the treasury an indemnity for the damages which he has suffered by reason of the executed judgment.

For damages suffered during detention pending trial a person who has been discharged from prosecution, or who is acquitted by judgment, shall, on his demand, receive indemnity from the treasury, if he successfully rebuts the proofs on which his guilt was predicated.

If the discharge from prosecution or the acquittal is based upon the fact that the transaction can not be brought within a provision of the penal law, or that punishment is excluded or suspended by reason of a circumstance recognized by the law, the court shall decide according to the circumstances of the case how far such indemnity is due.

SEC. 470. Indemnity is never to be granted where the accused by confession or otherwise through intentional conduct had provoked the judgment of conviction or the prosecution against himself, nor for detention pending examination which has occurred because the accused has attempted to flee or has so acted that the conclusion had to be drawn that he has sought to remove traces of the deed, or induce others to bear false witness, or to suppress their testimony.

SEC. 471. The fixing of the indemnity mentioned in section 469 may be demanded in the judgment or in the decree by which the case is terminated.

If this has not occurred or if the prosecution is abandoned without judgment or decree, the accused may, within a month after the receipt of the notice, bring his demand before the court which had jurisdiction of the criminal prosecution, or if this can not be done, before a court which might have had original jurisdiction over the case. The decision takes place by decree after the prosecuting attorney shall have been given an opportunity to defend the interests of the Treasury. If the Treasury is charged with a liability such as here in question, it can make the claim which the accused would have had by virtue of section 466.

> "SEC. 466. For negligent or otherwise improper conduct, so long as they are engaged on a case, public officers as well as private attorneys may be punished with fines, in so far as no greater penalty is by law applicable in the case, and damages are charged to them for the benefit of the person injured by their action. For the damages charged to a public officer, the State is equally responsible.
>
> "The State is not, however, responsible to a defendant for duties which an attorney according to section 107 should fulfill."

SEC. 472. If appeal is raised against a judgment on which this chapter provides legal liability, the highest court, ex officio, examines the question of liability in so far as the decision of this question depends on the ground of appeal; but further examination takes place only in so far as the appeal on this matter has been demanded by one of the parties. * * *

DENMARK.

Law of April 5, 1888, on indemnity for unjust detention and conviction and on the payment in certain cases of the expenses of appeals instituted officially. (Lov om Erstatning for uforskyldt Varelaegtsfaengsel og Straf efter Dom samt om Udredelse i visse Tilfælde af Sagens Omkostningeri offentlige Straffesager. Samling af Love of Anordninger, vol. 11, 1886–90, pp. 242–244.) (Translated into French in Annuaire de Législation Etrangère, v. 18, 1888, pp. 752–754.)

ARTICLE 1. He who, after having been subjected to detention pending trial, shall be subsequently acquitted or released without his case having been prosecuted to judgment, has a right to indemnity to be fixed by the judge for the wrong, injury, and pecuniary losses which he has suffered by reason of being deprived of his liberty, when it results necessarily from the explanations furnished that he was innocent of the wrongful act for which he was detained.

An equal right to such an indemnity belongs to him who has been subjected to detention pending trial by reason of inculpation in an act forbidden by a criminal law, but not involving a penalty greater than a fine or simple imprisonment.

ART. 2. The right to indemnity above mentioned ceases when the accused has by his conduct provoked his detention pending trial. Nevertheless, when the judge recognizes that the suspected conduct of the accused may have been due to fear, annoyance, or excusable error, he may award him an indemnity reduced in proportion.

ART. 3. If the case goes to judgment without any accusation against the accused, the latter may, if he desires, demand that the indemnity due him be fixed by judg-

ment pronounced when the case terminates. Nevertheless, the superior authority (in Copenhagen, the director of police) shall be advised in time sufficient to defend the public Treasury.

In all other cases the demand for indemnity for detention pending trial shall be the object of a special civil suit against the State. The summons shall be served on the prefect (in Copenhagen, the director of police) and on the examining magistrate who conducts the proceedings.

The claimant may bring his case before the tribunal of first instance in the place where he has been detained or directly to the superior court having jurisdiction over the examining magistrate, provided that it be not the supreme court. This action shall be without expense for either party, and the defendant charged with the interests of the State shall likewise take charge of the interests of the examining magistrate.

When the criminal action or judgment on the detention is appealed to a superior judge, the claim for an indemnity may be formulated and the judgment may be requested in the course of the appellate action. In that case the public minister is charged with defending the interests of the examining magistrate and those of the Treasury.

The decision of the judge of first instance on the demand for indemnity for detention pending trial may be appealed from by the accused, as well as by the public minister without limitation of amount.

ART. 4. Every action for indemnity for unjust detention pending trial shall be brought within a year from the day when the accused had knowledge of the circumstances on which he bases his demand. If his demand is considered without basis, he shall be condemned to pay the expenses of the case.

ART. 5. When a penalty pronounced by the judgment has been paid or expiated in whole or in part and it is regularly proved that the penalty was not justified, the condemned person has a right to an indemnity against the public Treasury for the wrong, injury, and pecuniary losses resulting to him.

The action for indemnity shall be instituted before the tribunal of first instance which had jurisdiction of the criminal case, service to be made on the superior authority and on that one or those of the judges who pronounced the conviction, or directly before the court immediately above, provided that it be not the supreme court. The provisions of article 3 concerning the actions for indemnity for detention pending trial shall apply moreover to the actions here in question.

ART. 6. The right of action for pecuniary losses, after the death of the accused, passes to his spouse and to his descendants.

ART. 7. The indemnities awarded in execution of the present law shall be paid by the Treasury, which shall have recourse against the judge when the latter shall have been guilty of abuse of authority, negligence, or other inexcusable fault.

ART. 8. In case of acquittal of the accused, and in general in all cases where the action ends without resulting in a conviction, the expense of the penal action prosecuted officially shall be borne by the Treasury, unless it shall have been occasioned in whole or in part by an illegitimate act imputable to the accused.

AUSTRIA.

Law of March 16, 1892, No. 64, Reichsgesetzblatt, 1892, pages 477-478. Law concerning indemnity for unjust conviction.

SECTION 1. He who has been legally convicted of a criminal act in accordance with the provisions of the code of criminal procedure, if on a new trail, the discontinuance of the prosecution or the rejection of the charge results, and furthermore in all cases in which acquittal subsequently takes place, may demand of the State an indemnity for the pecuniary injuries suffered by reason of the unjust conviction.

The claim is not permissible when the convicted person has intentionally brought about the unjust conviction or in case of a verdict obtained by contumacy has failed to make objection or take exception.

SEC. 2. Assuming the presence of the conditions of section 1, the claim may after the death of the convicted person be brought, or if begun by him continued, only by his spouse, children, and parents, and only to the extent that these relatives are by his wrongful conviction deprived of support which was due to them from the accused.

SEC. 3. The claim is barred after three months from the day on which under sections 1 and 2 the claim might have been first brought.

SEC. 4. The claim is to be brought by written request or protocol before the trial court of first instance which rendered the verdict of conviction and is to be made as definite as possible.

SEC. 5. The court is officially to undertake the necessary proceedings to establish the facts on which the claim is based, and may take the necessary proofs. All the circumstances for and against the claim are to be considered with equal care. Witnesses and experts may be called and oaths administered where necessary.

SEC. 6. When the inquiry is closed, the claimant is to be notified that he may make further statements in writing to justify his claim, for which purpose he is to have 14 days' time. The claimant may see the papers in the case.

SEC. 7. The sealed documents, together with an opinion of the court, is to be laid before the minister of justice, who may request a supplementary inquiry or further explanations. The minister of justice takes jurisdiction over the claim and fixes the amount of the indemnity.

SEC. 8. The claimant has a period of 60 days to appeal from the finding of the minister of justice to the supreme court. The period can not be extended under any circumstances, nor can the extension be granted for default. The appeal does not require the signature of an attorney.

SEC. 9. The proceedings in the matter regulated by this statute and the relevant memorials are free from fees and postage.

SEC. 10. The law does not apply to convictions pronounced before the coming into force of this act.

FRANCE.

Law of June 8, 1895, on the revision of criminal judgments and indemnities to the victims of judicial errors. Bulletin No. 1706, Bulletin des Lois, 1895. This law is substituted for chapter 3, book 2, title 3, of the Code of Criminal Procedure, articles 443–447.

Articles 443 to 445, inclusive, deal with the procedure for reopening a conviction for a criminal act. Article 446 deals with the matter of indemnity for the innocent victim of errors of criminal justice and reads as follows:

ART. 446. The decree or judgment of reversal whence results the innocence of a convicted person may, on his demand, award him damages for the injury caused him by the conviction.

If the victim of the judicial error is deceased, the right to demand the damages belongs under the same conditions to his spouse, ascendants, and descendants (in a direct line).

It shall not belong to relatives of a degree farther removed than would involve a material injury resulting to them from the conviction.

The claim for indemnity may be made at any stage of the procedure for the reversal of the original judgment.

The damages awarded shall be against the State, except that the latter has recourse against the civil person, the complaining or informing witness or false witness through whose fault the conviction shall have been pronounced. The damages shall be paid as expenses of criminal justice. The expenses of the appeal for reversal shall be advanced by the appellant up to the order of the court taking jurisdiction of the claim for indemnity; the expense after that order shall be paid by the Treasury of the State.

If the decree or definite judgment on appeal pronounces a conviction, the condemned person shall be compelled to reimburse the expenses to the State, or to those who demanded the appeal, if there are such.

He who demands the appeal for reversal of the first judgment and loses shall be held to pay all the expenses.

The decree or judgment on appeal whence results the innocence of a convicted person shall be posted in the city where the conviction was first pronounced, in the place where the judgment was reversed, in the community or place where the crime or misdemeanor shall have been committed, at the domicile of those who demanded the appeal, and at the last domicile of the victim of the judicial error, if he is deceased, and shall be officially published in the Journal Officiel, and its publication in five newspapers, at the choice of the appellant, should be ordered besides, if he requests it.

The expenses of publicity here provided for shall be borne by the Treasury.

HUNGARY.

Code of Criminal Procedure, December 4, 1896, Gesetzsammlung, 1896, pp. 664 et seq. Indemnity in cases of unjust arrest, detention, and punishment. Sections 576 et seq.

SEC. 576. He whom the court has legally acquitted of the charge against him or who has been discharged from prosecution has a claim to indemnity when he has suffered arrest or detention for an act, first, which he has not committed; second,

which has not been committed at all; third, which he has indeed committed but which, in the legal sense, is not a punishable act.

SEC. 577. An indemnity for a temporary arrest or detention pending trial can not be claimed by a person who, first, has attempted to flee or has fled; second, has made a false confession or false avowal of the crime; third, to remove evidence of the deed has sought to induce a witness or fellow accused to bear false witness or an expert to give a false opinion, or sought to suppress the testimony or opinion, as the case may be.

SEC. 578. He who on the basis of a valid legal judgment has been deprived of his liberty, or paid a money fine or from whom such fine has been exacted, has a claim for indemnity—first, when on rehearing of his case he is legally acquitted by a valid judgment; second, when on the rehearing or new trial a lesser penalty is prescribed against him than the one which he has already borne on the basis of the first judgment now declared invalid.

SEC. 579. An indemnity can not be demanded by one who—first, has made a false confession or a false avowal of the crime; second, who in the principal proceeding has intentionally suppressed the proofs upon which the court in the rehearing bases its judgment of acquittal; third, who in the proceedings establishing his guilt has not noted objections and appealed against the verdict; fourth, he who has voluntarily entered on his sentence as found in the lower court before that judgment has obtained legal force. (See sec. 505, par. 2; sec. 549, par. 1.)

SEC. 580. Indemnity is made by the State.

The indemnity covers a commensurate monetary compensation embracing the sum which the convicted person has paid as money fine and as court costs, the value of the objects which had been confiscated from him on the basis of section 63 of law 5 of the year 1878, and the sums which he has earned during the period of his wrongful imprisonment. Moreover, the court order establishing indemnity is to be published in the Official Gazette and in the official paper of the district where the court sits, or in a newspaper within the immediate vicinity, at the expense of the funds of the court, and is to be publicly displayed by the local authorities of the jurisdiction of the court and of the domicile of the accused, at a place designated by them.

SEC. 581. The claim to indemnity is barred when the individual does not make known his claim within six months from the time of notice served on him of the decree discharging him from prosecution or of the judgment of acquittal.

SEC. 582. Those who by law or legally recognized custom have the right to demand support from the accused having such claim to indemnity, may in case of his declining to sue make a claim set forth in section 580 for this purpose. They may, if the accused has brought his action within the period prescribed in section 581, request the continuance of the proceedings; if, however, the unjustly accused has died before the expiration of that period without bringing his action for indemnity, these persons may within six months from the day of his death request the institution of the proceedings.

SEC. 583. In cases where a valid judgment establishes that an individual who has suffered a death penalty would have been legally acquitted, those dependents who had a right to support from him may, if they were dependent upon this support, bring an action for pecuniary compensation for the support of which they have been deprived. With reference to the publication of the decree awarding indemnity, the provisions of the last paragraph of section 580 are to be applied, with the modification that the decree is to be publicly displayed by the local authorities of the last domicile of the accused; and, also, if requested by them, in the domicile of his relatives, if they reside at another place. In the case of this paragraph the period prescribed in section 581 is to be reckoned from the day on which the decree discharging him from prosecution, or of acquittal, comes into legal force.

SEC. 584. The action for indemnity is to be brought in the court before which the criminal proceedings were brought in first instance, or in the judicial circuit in which that court of first instance belongs.

SEC. 585. The proceedings for indemnity may be instituted verbally or in writing.

SEC. 586. The court must investigate the data necessary to establish the indemnity through official channels, and may demand evidence from both the wrongfully accused and from the public prosecutor.

The court may call witnesses and experts. Before the end of the investigation the wrongfully accused is to be informed that his remarks and motions must be handed in in writing within eight days.

SEC. 587. At the end of the investigation the court places its findings before the royal Kurie, or highest court, which, in case it decides that the claim for indemnity is justified, sends the papers to the minister of justice. On the basis of the findings of the royal Kurie, the minister of justice fixes the amount of the indemnity.

SEC. 588. To the extent of the amount of the indemnity the State has a subrogated right against all those whose actions or omissions have contributed to the facts making the indemnity payable.

Against the judge, court officials, or public prosecutor the State has a subrogated right only in case it is legally established that their actions or omissions which served to bring about the indemnity may be regarded as an official breach of duty or a punishable act. * * *

SEC. 589. He who by false complaint or false testimony, or a public officer who has wrongfully brought about the arrest, detention, or conviction of another, owes full indemnity for all injuries to property which the convicted or detained person has suffered in so far as the claim for indemnity is established (sec. 587) and the damage *exceeds* the sums awarded in accordance with section 580.

A person having a right to this indemnity may, instead of the indemnity, demand smart money up to the amount of 2,000 kroners, which amount the court at its discretion may fix.

GERMANY.

Law of May 20, 1898, concerning indemnity for persons acquitted on new hearing or retrial. Reichsgesetzblatt, p. 345.

SECTION 1. Persons who are acquitted on a new trial, or by the application of a milder penal law have a lighter sentence imposed, may demand indemnity from the Treasury if the earlier penalty has been executed in whole or in part against them. The new trial must establish the innocence of the convicted person of the deed charged to him, or with respect to the circumstance justifying the application of a greater penalty, or it must show that a well-founded suspicion no longer exists against the accused.

Besides the convicted person those who are legally dependent upon him for support have a claim to the indemnity.

The claim to indemnity is not permissible when the convicted person has intentionally or by gross negligence provoked the earlier conviction. Failure to note an appeal is not to be considered as negligence.

SEC. 2. The substance of the indemnity due to the accused is the pecuniary damage suffered by execution of the sentence. Those entitled to support have the right to compensation to the extent that they were deprived of support during the execution of the sentence.

SEC. 3. The indemnity is to be paid from the Treasury of that State of the Empire before whose court the criminal proceeding took place in first instance. Up to the amount of the indemnity thus paid, the Treasury is subrogated to the rights which the accused had against third persons, because their unlawful transactions led to his conviction.

SEC. 4. With reference to the duty of the Treasury to award indemnity, the appellate court in which the new trial takes place issues a special decree.

The decree is to be drawn up by the court simultaneously with the judgment. It is not to be published, but it is to be served on the person. There is no appeal from the decree. It goes out of force if the judgment of acquittal is reversed.

SEC. 5. He who makes a claim on the basis of the decree awarding indemnity from the Treasury must bring his claim forward within three months after that decree has been served by application to the public prosecutor. The application is to be handed to the superior court (Landgericht) in whose district the judgment was rendered. The highest administrative board of the State (Landesjustizverwaltung) decides on the application. The decision duly drawn up is to be served on the claimant according to the provisions of the code of civil procedure.

Against the decision appeal through legal channels is permissible. The complaint is to be brought within a period of three months after service of the decision. For the claim to indemnity the civil chamber of the superior court (Landgericht) has exclusive jurisdiction, without regard to the value of the matter in litigation. Until the final decision on the claimant's application the claim is not assignable or pledgable.

SEC. 6. For such matters as in first instance are within the jurisdiction of the supreme court, the Treasury of the Empire is chargeable with the indemnity instead of the State treasuries. In these cases instead of the public prosecutor of the superior court, the public prosecutor of the supreme court is substituted, and in place of the highest authorities of the State administration the imperial chancellor is substituted.

A very short statute of limitations is fixed, following the European statutes in this respect. The claim is to be brought before the Court of Claims, which has been granted jurisdiction over similar awards made by the United States to individual claimants. (See, for example, the French spoliations act, 23 Stat. L., 283.)

SEC. 3. That the court is hereby authorized to make all needful rules and regulations, consistent with the law, for executing the provisions hereof.

This follows in general the provisions of section 2 of the French spoliations act (23 Stat. L., 283).

SEC. 4. That the claimant shall have the burden of proving his innocence, in that he must show that the act with which he was charged was not committed at all, or, if committed, was not committed by the accused.

The cases in which the relief can be claimed are limited here to those only in which the claimant shall affirmatively prove his innocence. Hence only a most flagrant case of injustice could be brought within the terms of this section. In providing that the claimant must show that the crime was not committed at all, or, if committed, was not committed by the accused, I am following in general the provisions of the law of Sweden and Hungary. It is likewise intended to limit the relief to cases in which the justice of an award is obvious.

SEC. 5. That the claimant must show that he has not, by his acts or failure to act, either intentionally or by willful misconduct or negligence, contributed to bring about his arrest or conviction.

This carries out simply the equitable maxim that no one shall profit by his own wrong or come into court with unclean hands. It follows the provisions generally found in the European statutes, although these provide, for example in the German act, that gross negligence must exist to bar the right. In the United States we are opposed to fixing degrees of negligence. (See 18 Harvard Law Review, 536–537.)

SEC. 6. That the Court of Claims shall examine the validity and amount of all claims included within the description of this Act; they shall receive all suitable testimony on oath or affirmation and all other proper evidence; and they shall report all such conclusions of fact and law as in their judgment may affect the right to relief.

In its general provisions this section follows section 3 of the French spoliations act (23 Stat. L., 283). Under it the Court of Claims would, of course, receive the record from the trial court, the appellate court, and the second trial court, in order to determine the justice of relief in the case. They may also call for oral or written testimony whenever desired. This section gives the court full power and opportunity to arrive at the facts.

SEC. 7. That upon proof satisfactory to the Court of Claims that the claimant is unable to advance the costs of court and of process, the cost of obtaining and printing the record of the original proceedings and of securing the attendance of such witnesses as the chief justice or the presiding judge of the Court of Claims shall certify to be necessary, and the service of all notices required by this Act, shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a duly authenticated order, certified by the clerk of the Court of Claims and signed by the chief justice or, in his absence, by the presiding judge of said court.

The claimant will in most cases be a poor person and it is desirable that the expense of bringing up the record should not fall as a burden on him. This expense might, in fact, prevent the poor claimant from bringing suit at all. It should, therefore, be provided that in such

cases where the chief justice, or the presiding judge of the Court of Claims, considers that the claimant has made out a prima facie case of erroneous conviction and his own innocence that the expense of bringing up the record shall be borne by the Treasury. Where the claimant does not make out a prima facie case coming within the provisions of this Act, the chief justice of the Court of Claims would not make the certification necessary to have the Treasury bear the expense.

SEC. 8. That the court shall cause notice of all petitions presented under this Act to be served on the Attorney General of the United States, who shall be authorized, by himself or his assistant, to examine witnesses, to cause testimony to be taken, to have access to all testimony taken under this Act, and to be heard by the court. He shall resist all claims presented under this Act by all proper legal defenses.

The purpose of this section is self-explanatory. In terminology it follows the provisions of section 4 of the French spoliations act (23 Stat. L., 284).

SEC. 9. That the Court of Claims in granting or refusing the relief demanded shall take into consideration all the circumstances of the case which may defeat or in any other way affect the right to and the amount of the relief herein provided for, but in no case shall the relief granted exceed $5,000.

The granting of the relief is *discretionary*, as was stated in the beginning. Most of the European statutes generally present a list of conditions which shall bar or limit the right to the relief, but I consider it best to follow the French law, which makes no mention of limiting conditions, but leaves the judge to determine from all the circumstances of the case whether any and how much relief is proper. The relief is limited to $5,000. This provision is to limit any exorbitant claims which may be brought.

The Court of Claims is given jurisdiction over the matter in preference to the trial court, or the appellate court, or the second trial court (which presumably could judge better of the merits and circumstances of the case) in order to maintain the traditions of American judicial procedure. If the jury or trial court were given the right to pronounce on the propriety of an award in a case of acquittal (as is the case in some of the European countries), it would bring into our law a new kind of acquittal, in which the jury or judge could acquit *with degrees of approval or sympathy*. The distinction would be an odious one to make. While it would be desirable to have the benefit of the special knowledge of the case secured by the trial court or the jury, still it is better to forego this advantage for the sake of conformity with legal custom and leave the establishment of the damage to a new court conforming in its jurisdiction in this case to its jurisdiction in similar cases of claims against the United States.

In all respects (*a*) as to the person indemnified, (*b*) as to what he must show, (*c*) as to the amount of the indemnity, and (*d*) as to the discretionary character of the relief, the indemnity has been limited to the most flagrant cases of unjust conviction and deserving relief.

SEC. 10. That in all cases of final judgments by the Court of Claims the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice or, in his absence, by the presiding judge of said court.

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